

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

2004

Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary

Ann Shalleck

Robert Dinerstein

Stephen Ellmann

Isabelle Gunning

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Legal Education Commons](#)

CONNECTION, CAPACITY AND MORALITY IN LAWYER-CLIENT RELATIONSHIPS: DIALOGUES AND COMMENTARY

ROBERT DINERSTEIN, STEPHEN ELLMANN, ISABELLE GUNNING
& ANN SHALLECK*

As important, and difficult, as it is to offer new law students clear and helpful frameworks for the interpersonal work of lawyering, doing so is only part of what a clinical textbook may aspire to. In our textbook-in-progress, we hope to offer both frameworks and support for students' sense of the incompleteness of every framework and for their recognition of the need for careful, flexible response to each individual client. Even care and flexibility by themselves are not enough, however, and every text must choose which aspects of lawyer-client relationships it will emphasize most. In the sections that follow, we focus on lawyers' development of "connection in context," emotional connection and common ground with clients forged even across considerable gaps of difference; on the application of these skills across especially large contextual gaps, as illustrated in an interview with a client with a mild intellectual disability; and on the ethics and skills of making one special form of connection with a client, the moral relationship entailed in a "moral dialogue." These dialogues and commentaries explore many complex moments between lawyer and client, but they also reaffirm the central importance of a fundamental skill and virtue – listening – in the lawyer's work of creating, in each case, a theory of the representation.

* Robert Dinerstein is Professor of Law and Associate Dean for Academic Affairs, American University, Washington College of Law. Stephen Ellmann is Professor of Law and Associate Dean for Faculty Development, New York Law School. Isabelle Gunning is Professor of Law, Southwestern University School of Law. Ann Shalleck is Professor of Law and Carrington Shields Scholar, American University, Washington College of Law. Earlier versions of portions of this article were presented at the UCLA/IALS Fifth International Clinical Conference on "Problem Solving in Clinical Education" in 2001 (Parts I, II and III), at the Clinical Theory Workshops at New York Law School (Parts I and III), and at a faculty workshop at Washington University, American College of Law (Part III), at which Muneer Ahmad was the commentator. The authors thank the participants in all these sessions for their helpful comments and questions, and also thank John Leubsdorf, Stephen Pepper, and Thomas Shaffer for their thoughtful readings of an earlier draft of Part III.

The material in this article is excerpted, with some modifications, from drafts of chapters for our textbook, *LEGAL INTERVIEWING AND COUNSELING*, to be published by Thomson West, and is copyrighted by, and used with the permission of, Thomson West.

INTRODUCTION

A textbook on interviewing and counseling is, in part, a primer for very inexperienced students or new lawyers. New interviewers and counselors cannot just be asked to sink or swim. They will probably not sink, but they may never learn to swim well, and meanwhile their clients will be consigned to endure their initial, often fumbling, efforts to learn. For these readers, and their clients, a textbook must offer clear frameworks for new practitioners' initial efforts.

At the same time, no framework can be followed blindly. Because the real world is a world of vast variation and unpredictability, as we wrote in the most recent issue of the *Clinical Law Review*, "[w]e want students to be able to think flexibly and creatively about how to approach the variety of interactions that can occur within the lawyer-client relationship, rather than unreflectively reverting to a standardized vision of the relationship that makes other interactions seem deviant."¹ To teach such flexibility and creativity requires more than a book, but a book can help by reflecting some measure of the potential nuance and difficulty of actual situations in the examples and analyses it offers.

One might imagine that what a textbook should do, then, is to provide useful frameworks and a comprehensive analysis of the variations on those frameworks that are likely to arise. But just as people perceive their everyday surroundings with the aid of any number of simplifying and guiding preconceptions, so a textbook must reflect choices about which of the countless issues presented in any client interaction deserve most emphasis. Moreover, clinical teachers and practicing lawyers have not evolved and can hardly devise perfect solutions to the problems of interviewing and counseling, and so a textbook can also be the occasion for exploration that goes beyond the description of useful, basic frameworks to suggest approaches and perspectives that have not yet become second nature.

With these thoughts in mind, we hope to highlight several themes in our book.² One is the importance of the contexts within which lawyers encounter their clients. "Contexts" are multi-faceted, of course, and range from situational factors as simple (and as profound) as the location where the attorney first meets the client, to broad societally shaped differences like race, class, gender, sexual orientation, disability, culture or citizenship status. Contexts in turn affect, and are affected by, a second theme, connection. Clients will have families and

¹ Robert Dinerstein, Stephen Ellmann, Isabelle Gunning & Ann Shalleck, *Legal Interviewing and Counseling: An Introduction*, 10 CLIN. L. REV. 281, 291 (2003).

² See *id.* at 294-306.

communities to which they are connected, and these bonds may or may not be culturally or socially similar to those of the lawyer's own life. These connections and differences will in turn affect the kind of connections that lawyers make with their clients. Finally, a third theme, intersecting with and to some extent growing out of the first two, is ethics — the ethical concerns, some explicit in the professional codes and some not, that infuse every step of lawyers' response to those contexts and connections.

In the sections that follow, we offer examples of the ways that we seek to bring these themes together. Each of these sections is very much a work in progress, and we offer them in the hope that readers will respond with comments and critiques.³ Our goal in our text, as we have explained, is to unite the basic skills involved in interviewing and counseling with these important overarching themes we have identified. Rather than focus in this excerpt on the particular models we are developing for the range of skills involved in interviewing and counseling, however, we present here illustrations of how we have explored the themes of context, connection and ethics in conjunction with some of the fundamental interviewing skills being presented to the student reader. Specifically, in Part I we focus on crucial building block skills required for constructing connection in context, through examples of lawyers' efforts, sometimes well-aimed and sometimes not, to convey emotional connection and find common ground with their clients. In Part II we seek to emphasize both the variations, and the commonalities, in building connection across especially large contextual gaps of difference, by looking closely at an interview with a client with a mild intellectual disability. Finally, in Part III we focus particularly on connection and on ethics, in a discussion of whether, and if so how, lawyers should engage in "moral dialogue" with their clients. We hope that together the dialogues and commentary in these sections will help clarify the issues with which lawyers wrestle and help potential readers to begin to develop, overall and in each individual case, the "theories of representation" that they will use to guide their work.⁴

I. BUILDING CONNECTION IN CONTEXT

The task of building connection in context is a pervasive issue in any lawyer-client relationship. Everything the lawyer does may affect the connections she establishes with her client (and so will everything the client brings to the encounter, including the other connections that

³ Needless to say, we also would be delighted to provide drafts for any clinical teachers interested in experimenting with them as teaching materials.

⁴ See Dinerstein et al., *supra* note 1, at 307-08.

help shape his life). We focus here on three aspects of the lawyer's task: first, the process of conveying empathy and other emotional support; second, the lawyer's responsibilities in responding to her own feelings of similarity to, or difference from, the client; and, third, an illustration of the lawyer's work in the early stages of an interview, in hearing the client's story despite the potential and even the reality of some significant misunderstandings across difference.

A. Conveying Empathy and Other Emotional Support

1. Empathy and other supportive emotions

Empathy and its cousins, including sympathy, approval and support, are key ingredients in the kind of respectful and helping lawyer-client relationship that we envision. These qualities are not easily definable, however, and they overlap.⁵ **Empathy** is a sharing of some of the feelings that the client expresses, as the lawyer seeks to imagine what it would be like to be in the client's emotional state so as to understand, nonjudgmentally, the various aspects of the client's situation. **Sympathy**, or identification, is a stronger, more emotional, sharing with the client, in which your own self-awareness is reduced as you put yourself in the client's situation and emotional state. Your identification with your client's circumstance and perspective can lend an urgency to your desire to help the client resolve his predicament or task. More plainly, **approval**, direct expression of agreement with or admiration for some aspect of the client's actions or words, is by definition judgmental. Finally, whether or not a lawyer conveys empathy, sympathy or approval for her client, she must at least offer **support** – an assertion, with some authenticity, that she is willing to help. Each of these emotions may have a place in lawyer-client relationships, but in the following discussion we focus primarily on empathy, which we view as particularly important.

2. Active listening and empathy

First and foremost, it is crucial to listen. There are many tools to aid in real listening, but here we focus on one of the most critical: **active listening**. Active listening is a particular form of listening that involves conveying to the speaker, here your client, that you have heard both the substance of what she has said as well as its emotional

⁵ Scholars have debated how to define empathy, and the definitions we give here are meant only as practical working definitions to guide subsequent discussions. For helpful psychological definitions of sympathy and empathy, see Lauren Wispé, *The Distinction Between Sympathy and Empathy: To Call Forth a Concept, A Word Is Needed*, 50 J. PERS. & SOC. PSYCHOL. 314, 318 (1986). See Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 991-93 (1992) for a review of the various uses of empathy in clinical legal literature.

content. You do this by “mirroring” or paraphrasing what you have heard said explicitly, and by putting into words the implicit feelings emanating from the speaker; sometimes you may answer on only one of these levels (addressing explicit content or implicit feelings, but not both), but often you will need to respond both to the client’s words and to his emotions. It is important to note that you will or should use active listening from the moment you meet your client, and consistently thereafter, as a way to verify for yourself and your client that you understand what he has told you and as a way of demonstrating your respect for and sympathy with his concerns.

Consider these examples:

In the first dialogue, Harriet Long, a family lawyer, is a divorced African American woman in her 50’s. Her client, Betty Ann Jackson, is also in her 50’s, but Caucasian. Jackson seeks Long’s help for a divorce and custody matter.

L1: Mrs. Jackson, good to finally meet you in person. Please sit. How may I help you today?

C1: Hello, Ms. Long. Well after 25 years of marriage, of putting him through dental school and raising his children, my husband has found someone younger, thinner and childless and I need to decide how to kill him and get away with it.

L2: Ah Mrs. Jackson I see. After all you have done in this marriage, you fear this affair will break it up.

C2: I guess that is fair. Although he has said that he wants to leave me for . . . her, so it seems like the marriage is pretty much over.

(A few minutes later in the conversation):

L3: So, Mrs Jackson After many years of marriage where you have been an enormous support and helpmate to your husband and mother to his and your children, your husband has made it clear that this recent affair will break up your marriage and you are hurt and angry.

C3: Yes. I can’t believe that this is happening. He was never a cheat and I guess I thought if he did he would be like my friends’ husbands who still stay in the marriage but this That he would really leave after all these years!

L4: Okay. So you may well be facing a divorce. And we can talk about the specifics of that. I recognize that this kind of circumstance is bound to cause some very strong feelings in you and I want us to address those. But let’s agree to put the killing issue aside, shall we? Tell me more about how you are feeling about what your husband said and what you think, now, you would like to do about it?

Here attorney Long immediately learns from her new client that a divorce matter is the likely legal object of this representation *and* that her client is quite bitter and unhappy. She uses active listening to show her client that she has heard the gist of what the client has said. Long's response at L2 both paraphrases some of the facts—"after all you have done"—and names one of the possible emotions involved, fear. When an attorney should do a summary of the facts that appear most important, along with a more complete restatement of the client's emotions as the lawyer has heard them, is a judgment call that turns on how the rest of the conversation has progressed, but you should certainly consider making such a statement to your client. Attorney Long summarizes her understanding of the facts and emotions at L3 where she paraphrases all the facts—the marriage has been long, the wife has taken care of the husband in some respects and there are children—and names the emotions—hurt and anger—that underlie the assertion "I need to decide how to kill him and get away with it."

The lawyer's restatement of "killing him" as "hurt and anger" demonstrates several characteristics of active listening. First, her response was not a "stupid" or literal paraphrase of the client's statement. Long does not say "Ah Mrs. Jackson, you want to take out a contract on your husband's life and need my help in drawing up the particulars." The lawyer understands that the client's words are much more likely an expression of emotion than of criminal intent, and she rightly avoids attributing to the client a literal meaning that is extreme and offensive. Second, however, while the phrase "kill him" probably is a figure of speech, the lawyer also picks up on the acute ethical issue that would be raised if there is any literal truth to the assertion, and she puts herself on record immediately as discouraging the client from even thinking about pursuing such a course of action. And third, notice that in lightly discouraging the client from thinking that killing would be appropriate, the attorney is disagreeing with her client. Young lawyers and students sometimes think that active listening and the support it conveys mean never disagreeing with your client. However, you will have occasions to disagree with clients; and many of those times clients will expect to hear your differing opinions.⁶

Sometimes the client's feelings will be farther from the surface than in our first example. In the following dialogue, Allen Anderson, an employment discrimination attorney, is a white male in his 40's who, due to a shooting, cannot walk and uses a wheel chair. His client, Anthony Braxton, is also a white male and in a wheel chair, but in his late 20's.

⁶ For an example, see *infra* Part III (discussing "moral dialogue" with clients).

- L1: Mr. Braxton, it is a pleasure to meet you. I see you were given coffee. So . . . make yourself comfortable and please tell me what employment matter I can help you with?
- C1: Well Mr. Anderson, where to begin? Well for one thing I just learned this morning that all of my coworkers at the brokerage firm I work at, Burnham and Block, make almost twice as much money as I do and I figured I should talk with a lawyer about my options.
- L2: All right, Mr. Braxton. You learned something today that you had not known before, which is that you are apparently the lowest paid employee at your job and you feel that this fact, if true, is unfair and want to know if the law can help.
- C2: Well it's true. And it's not just unfair. I have worked hard, gotten the highest evaluations and gone through . . . well, just not gotten any kind of support at that office.
- L3: It sounds as if with your work record and evaluations you should be at or near the top of the pay scale and so you are feeling quite angry and maybe even surprised by this revelation.
- C3: Yes, but maybe not entirely surprised.
- L4: Please tell me more. How did you discover this and why aren't you surprised?

Here attorney Anderson, while given facts, is not given much emotional content to work with based upon what his client tells him. In an actual interview, of course, there may be any number of nonverbal cues that convey the client's emotional state, like the tone or intensity of his voice, facial expressions, the color of the eyes or skin, and the movements of different parts of the body.⁷ Still, despite the (possible) paucity of information, the attorney forges ahead and both describes the facts he has heard ("you learned something today . . . you are apparently the lowest paid") and attaches a likely emotional state ("you feel this is unfair"). The inferences the lawyer makes about the client's emotional reaction are plausible; they fit with the juxtaposition of the client's discovery of his low pay and his seemingly immediate consultation with a lawyer. But the lawyer could be wrong.

Indeed in this case, the client does not really feel that "unfair"

⁷ While these cues can be valuable, they are also easily misread, especially across cultural differences. See Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLIN. L. REV. 373 (2002); Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U.L. REV. 345 (1997). For a valuable discussion of how to approach teaching cultural competence, see Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001).

quite captures his feelings. Like most clients, however, the client does not hold the lawyer's inability to "mind read" (or "heart read") against him. He corrects the lawyer by providing him with more information. That information still emerges as a factual account rather than a direct assertion of feelings. But the new facts—the client's hard work and excellent evaluations—lead the lawyer more confidently to identify and label some of Braxton's feelings as anger and surprise. In addition, the client's cryptic and incomplete reference to having "gone through" something, followed by a pause and then a statement about lack of "support," suggest to the attorney the strength and color of the client's emotions, despite the client's difficulty in speaking about them.

Although active listening is a critical tool to underscore that you are listening to your client, it is generally not seen by the novice as a very natural or comfortable way to respond. The young attorney or law student sometimes feels that it is difficult to come up with true active listening responses and that the client will view his awkward attempts as phoniness. Effective active listening responses are difficult for many new interviewers to imagine or to formulate on the spot and so require practice. While early and self-conscious efforts at active listening may have a feeling of "phoniness," it is our own view and experience that clients *sense* phoniness and can tell it apart from the authentic feeling communicated by the lawyer regardless of how smoothly or awkwardly she speaks. A sincere attempt to understand the client's factual statement and feelings, no matter how stiff and even off base, will usually be met with appreciation by clients for the effort made by the attorney—even if the client ends up having to correct what you have said.

3. *Other techniques for conveying empathy, sympathy, approval and support*

Powerful as active listening is, the lawyer also has other tools for communicating regard for her client:

(a) **Direct assertions** can be valuable. You as the attorney can explicitly state your own feelings, reactions and intentions. The lawyer might directly express empathy or sympathy; for example, attorney Long might say to Mrs. Jackson, "I am sorry to hear about the distressing circumstances of your divorce." Or Anderson could say to Braxton, "It is very frustrating to have worked so hard and not get paid what is your due." Or the lawyer might offer a direct assertion of what kind of support or help the attorney will give. Long or Anderson could say: "Mrs. Jackson [Mr. Braxton], you can rest assured that I will work my hardest to help you through this difficult time."

Be careful of direct assertions such as “I can understand how [difficult, frustrating, etc.] this is,” especially early on in a relationship. Obviously you are doing your best to understand, but you need to remember, objectively, that you are not in fact your client and her circumstances are in fact different. Indeed, sometimes a client’s background and circumstances will be quite unlike anything to which her attorney has personally been exposed. Especially in these situations, it is important to convey to your client your awareness that her situation is different from yours and that you are listening intently to learn and understand her particular facts, feelings and goals.

(b) Another technique to convey empathy, sympathy or support is **apology**. Most often apology is used as a recovery technique. When you, as the attorney, have inadvertently said something that angers or distresses the client, you need to try to recover the trusting connection that you had previously established. A natural way to do so is by apologizing for your mistake.⁸ The language of apology may also double as the language of sympathy when you the lawyer are not in any way at fault, for example in attorney Long’s statement to her client above: “Mrs. Jackson, I am sorry to hear about the distressing circumstances of your divorce.”

Another technique that is also closely related to a recovery method is **explanation**. As you would expect, explanation is simply telling the client why you have made a statement or asked a question or suggested a particular course of action. Young attorneys and students especially are often inclined to ask clients lots of questions. Typically the questions are all excellent—that is, they directly relate to acquiring information that will allow the attorney to assess which legal doctrines will or will not be applicable. But clients are often confused about such questions and can experience this process as indifference to their concerns as they feel and understand them. Providing clients with explanations can alleviate that sense of disconnection from the questions of the lawyer and can build (or rebuild) sympathy and connection. Explanation is also a good way to convey your respect for the client’s dignity and privacy.

(c) A technique that facilitates apology and even explanation is **nonresentfulness**. If you need to use apology as a recovery technique, you may feel defensive. (After all you were only doing your best and you may feel it is your client who was unclear or confusing.) In general, you should avoid expressing defensiveness or resentfulness; perhaps more important, try not to fall into such feelings (but recognize them if you do). Be mindful⁹ of the fact that your clients are typically

⁸ We offer examples of apologies below. See *infra* text pages 764-65, 776-78.

⁹ Cf. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of*

in stressful situations; that is why they come to you. Even in transactional work, a client who must close a big contract or deal can be upset or anxious. You can be an easy target for outbursts. Attacks can feel personal, especially to the new attorney who already harbors concerns about his still awkward skills, and they can certainly be expressed in painfully personal terms. But you should remember what the situation is and try to avoid taking such statements as actual attacks on you.

As an example, in the Braxton case, it might be that Braxton senses, rightly or wrongly, that since Anderson has a nice office and an apparently successful practice, his walls decorated with degrees from schools Braxton recognizes and admires, Anderson has had no experience with injustice at work. Braxton's reaction might be more likely if we imagine Braxton to be close in age to Anderson and to see him as a peer who had excelled beyond what Braxton had dreamt of for himself. In this situation, Anderson may unwittingly trigger Braxton's bitterness at his attorney's success:

- L1: Well, Mr. Braxton, it sounds as if with your work record and evaluations you should be at the top of the pay scale. I can understand how being overlooked in the pay and promotion department could make you angry.
- C1: Can you, Mr. Anderson? You seem to have done very well for yourself. Probably played football and were Mr. Big Man on Campus starting from kindergarten. Can you really understand what it's like for a guy like me? The kid the jocks bullied until I was halfway through high school and my parents moved to a new town. I don't think so. This was a mistake for me to come here.
- L2: Wait, Mr. Braxton, I am sorry for my choice of language. Neither one of us knows enough about the other to make assumptions. And I shouldn't have assumed too much. I have been successful, yes. And since I came by that success fairly, I believe everybody who works hard should get their just deserts as well. That is why I believe that I can help you. Please, tell me more about your situation so that I can begin to understand.

Here Anderson has used the phrase "I can understand. . . ." and received a hostile response. We have cautioned against the phrase for just this reason (though clients can take offense or get angry without such a prompt).

Anderson's response to Braxton illustrates nonresentfulness, as well as techniques of apology, explanation and direct assertion. He

quickly apologizes, saying "I am sorry for my choice of language." He goes on to acknowledge his mistake of "assum[ing] too much" in the context of a gentle rebuke to his client, as he reminds Braxton that "neither one of us knows enough. . . ." He uses the technique of explanation to clarify what his own values and views are, and to defuse his client's suspicions. And then he makes a direct assertion of support, stating that he can help the client and, by implication, that he is willing to help.

Two points are important to flag here. First, successfully responding without resentment depends upon conveying sincerity. Anderson's nonresentful response is highly contextualized: in other words, it is contingent upon his tone and body language. If he in fact is resentful and defensive, no amount of carefully constructed language will prevent the client from sensing the underlying feeling. If you cannot keep the resentment out of your voice, it may be wise to acknowledge your own feelings directly. To pretend that you are not really angry when you are may only encourage the client to feel that you are not truthful. The client's suspicions about your true feelings may well undermine his development of trust in you.

Second, even if Anderson has avoided defensiveness, he has included in his response a gentle rebuke, and his doing so raises the issue of how far the attorney should introduce his own feelings into an interaction with a client that is designed to convey empathy and emotional support. Should the attorney say "Neither one of us knows enough about the other to make assumptions"? Doing so certainly is a way of saying what many of us would want to say—in essence "Hey! You are making a lot of assumptions about me and you don't know me!" If the attorney can maintain a gentle and apologetic tone, this articulation of a genuine and appropriate emotion that is responsive to the client's outburst could be successful. The rebuke could express the lawyer's genuine engagement in the interaction with the client and her desire to establish a meaningful and respectful relationship. On the other hand, right tone or wrong tone, the client could feel criticized and fail to hear anything else the attorney has said.

(d) Another technique for conveying or maintaining empathy and similar feelings is **personal connection**, or **sharing**. An attorney could choose to share some detail in his life as a way of explaining his ability to understand or empathize. Attorney Long, being a divorced woman herself, might share that fact or some details of her own history that appear to be similar to the client's. Or attorney Anderson may not have been the popular sports figure Braxton imagines and could relate his own experiences with bullying.

While the other techniques that we have described are essential

and should be used, at appropriate points, by all attorneys, personal disclosure is a matter of personal choice. Not all individuals will be comfortable sharing personal information with a stranger. This truth is part of what makes self-disclosure a powerful tool with clients if you can wield it effectively. Clients often do not want to have to tell you, a stranger, their personal situation, mistakes, embarrassments and problems. Your willingness to share can make the relationship feel less imbalanced as well as underscore your ability to empathize or sympathize with the client's situation. But the technique has its pitfalls as well. When you are acting as someone's attorney—even if the client in other circumstances is a personal friend of yours—the focus is not on you and your problems, history or issues; there is no equal time as one would expect with a friend. And you will need to maintain a certain boundary between you and your client so that you can deliver the critical or negative assessments and information that are a routine part of the lawyer-client relationship. Friends can avoid bad news—rightly or wrongly. Lawyers cannot. Our choice is not whether to deliver it but how and when.

B. The Lawyer's Feelings of Difference and Connection

Building connection is by no means merely a matter of the lawyer's employing particular techniques that elicit desired reactions from the client. Some of the barriers to communication in lawyer-client relationships come from the client—but some come from the lawyer. Empathy must be accompanied by rigorous self-examination. You surely will have clients whom you experience as “difficult,” but part of your response must always be to reflect upon yourself and your skills and attitudes as a lawyer. The responsibility is on you, as the professional in the relationship, to do the self-analysis needed to recognize and if possible overcome your contribution to the difficulties in the relationship, and to focus your interactions with the client on his problems and concerns.

Empathy, sympathy and approval raise key and complicated issues around **identification** versus **objectivity** in your relationship with your client. To empathize with a client and identify with her circumstances or cause can provide an energy and enthusiasm that can prove invaluable in an attorney-client relationship. Most of the social justice or civil rights movement attorneys shared (and do share) the passion and perspective of their clients. The attorneys with the NAACP (National Association for the Advancement of Colored People) Legal Defense and Educational Fund who were instrumental in the

landmark desegregation case of *Brown v Board of Education*¹⁰ were as passionate about equality issues as their clients were, if not more so. That kind of alliance with the client can be a benefit to the attorney-client relationship; it can bolster the clients' morale and spirits during long and difficult litigation.

Such alliances also can have drawbacks. Attorneys can "over-identify" and assume they know exactly what the client wants or needs. And an attorney could be perceived by the client as pushing him to do things that he, the client, may not, or may no longer, want. Harriet Long, as a divorced woman herself, may have had an experience so similar to her client's that identification with the client's feelings of anger and betrayal comes quite easily. Betty Ann Jackson could feel comforted to have an attorney who has "been there" and who resonates with her feelings; the similarity of experience could help her believe that her lawyer is truly a champion for her. On the other hand, Long does have to have enough self-awareness to resist assuming that she knows exactly how Jackson feels and that their divorce situations are exactly alike.

Moreover, objectivity is vitally important. The empathetic attorney must be wary of too complete an identification with the client. You will need to step back from the client's situation, in ways that the client often cannot, in order to provide the critical eye and assessments that are part of your obligation to him.

In addition, there will, inevitably, be clients with whom the lawyer does not readily identify—yet they too need faithful representation. Many clients have done things that their attorneys do not agree with. The defense of any number of criminal defendants who kill, rape, bomb or embezzle from others as well as the representation of any number of civil defendants who manipulate stocks, massively pollute the environment or manufacture unsafe products all depend upon some attorneys being able to develop an attorney-client relationship with people (and corporations) who have engaged in activity or who hold attitudes with which the attorney cannot closely connect. In some cases, the attorney will have to stretch to find a loose sympathy with some aspect of the client's case, circumstances, personal background or personality in order to make some kind of connection. You need to avoid "under-identifying" with your client, because this distancing relationship can lead to an unconscious unwillingness to do your best and undermine your client's confidence and trust.

So, for example, Allen Anderson may have no experience with failure at any job. He may not have had any personal experience of

¹⁰ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

discrimination or unfairness in the employment context. Strongly identifying with Anthony Braxton may be difficult, but by imagining what he might feel like if his hard work had not paid off as it had in his past, Anderson could certainly find some measure of empathy or sympathy for Braxton. What if it turned out that Braxton, contrary to his self-portrayal to Anderson, is a lousy worker or even a dishonest one? While this may make Braxton even harder to bond with, Anderson's job as an attorney (and yours) is to stretch his abilities at sympathetic understanding to at least appreciate the distress and fear that anyone would feel at finding himself the lowest person on the ladder. This connection may not be a close one, but it can sustain and help convey the lawyer's support—his willingness to do his best to explore whether the client might still have any case. And assuming that it turns out the client does not have a case, the lawyer can and should remember and even restate this kind of connection as he crafts a nonjudgmental delivery of the bad news that the law can't help the client given the facts.

These points can be generalized, for the lawyer's feelings of connection to or distance from a client need not come only from her feelings about the justice of the client's claims. You may encounter a client and early on feel either "we have nothing in common" or "s/he's just like me." Perhaps this feeling stems from physical repulsion—or attraction. It could also be a response to a host of habits, personality quirks or character traits that a lawyer could be extremely drawn away from (or drawn to). Before deciding that it is all the client's fault, as we have already said, an attorney needs to examine his own habits and traits. You could be reacting because of your own issues. Only when you recognize and acknowledge your reactions can you use effectively the many techniques for establishing the kind of connection that is so important in the attorney-client relationship.

While both too much attraction and too much distance are problematic, the feeling that "we have nothing in common!" may be a more frequent source of difficulty. Besides recognizing it, what can a lawyer do about it? One step we have already identified, in discussing Anderson and Braxton, is to look for commonalities that might not be readily apparent. Another straightforward step is to identify any and all characteristics in the client that you can recognize as positive. Think through how what appear to be negatives could be viewed as positives. At the least, find an explanation for your client's apparently negative behavior. Whether your client is a corporate CEO or a gang leader, both could come off as arrogant and indifferent to others. You don't have to "like" what either is or does to recognize that each of these clients, whether dealing with hostile takeovers of corporate stock or illegal drug trade routes, has to survive in environments

where any show of weakness, such as concern for others, may be viewed as a liability.

Connection and disconnection can also grow from differences rooted in larger social or cultural background influences, or socially constructed identity categories, that *could* make your perception of the world quite different from your client's. You may feel that you could never possibly understand your client because the two of you differ so much in terms of gender, race, class, culture, religion, sexual orientation, or citizenship status or other factors. Conversely, you may feel that such differences have no impact at all on your interaction and engagement with your client. Broadly, we think that these differences do matter, and in ways that are complex and sometimes unpredictable, but that they are not ordinarily impassable barriers to lawyer-client connection. As powerful as these factors are within society and often within individuals, the lawyer's goal should be to acknowledge them and then to work to overcome the barriers they may generate.

The responses that we have already discussed in the context of other gaps between attorney and client may be useful in this context as well. It is important to take the ancient expression "nothing human is alien to me" seriously. We are all related as members of the human race and family. Despite apparently vast differences, the few things two people happen to have in common can make connection a breeze—the Irish lawyer and Latino client, for example, may bond through their shared Catholicism. Even if similarities are not immediately evident, with enough time and effort people generally can find commonalities.

Discovering these connections necessarily may require hard work and patience. Good intentions alone may not be enough. Educating yourself about the experiences and lives of homeless people or mentally challenged people or people who are recent immigrants or people from different racial or ethnic groups is often essential to supplement your well-intentioned attempts to connect with people who are different from you. The potentials, and pitfalls, can be seen if we return to Harriet Long's interview of Betty Ann Jackson, and Allen Anderson's meeting with Anthony Braxton.

Harriet Long and Betty Ann Jackson, who have so far seemed to find common ground, may in fact have major differences that could interfere with their relationship:

L1: Hello, Mrs. Jackson, how can I help you?

C1: Well, Ms. Long, my husband is about to run off with someone young enough to be our daughter and I need help especially since here in Connecticut I am so far from my own family.

- L2: Mrs. Jackson, you have come to the right place for help in family matters. And I have some sense of the difficulties of going through hard times without the rest of your family. Connecticut is a long way from my original home too.
- C2: I am guessing Alabama, like me, from the sound of your voice. I am from Birmingham.
- L3: Yes. Birmingham for me too. Most of my family is still there. So tell me more about your situation.
- C3: I just can't believe it. I never thought I would be one of all those many people getting divorced. When you think back to when we were kids, marriages stayed together and life was so much easier.
- L4: Well, marriages did stay together. And certainly some things were easier.
- C4: Oh, oh, I didn't mean the whole Jim Crow thing. Or the bombing of the Sixteenth Street Baptist church where those little black girls were killed. I . . .
- L5: I know. Fortunately, some of that has changed. So tell me about your situation. It sounds painful and I confess . . . my own ex-husband left me for his nurse after I put him through Yale college and med school.

Here the fact that the two women are of different races could prove an impediment to the attorney-client relationship. While we all hope that these sorts of issues will not matter, too often they do continue to have some significance. The key for an attorney is to be able to examine herself honestly to identify whether she is bringing some hindering issue to the equation. Here, Long does not on the face of it appear to have any racial bias toward whites, but her client's views on what living in Birmingham, Alabama in the 1950's and 1960's was like are drastically different from hers and very reflective of the different experiences that blacks and whites had due to legalized segregation and racial inequality. Here, Long consciously chooses to skirt around their differences and instead focus in on the similarity that she recognizes they share, a similarity she emphasizes with candid self-disclosure.

It is striking that just as this situation could have deepened into mistrust, it could also have led the lawyer to feel that her client was "just like me!", if the lawyer's focus had been on the factors which make the two women quite similar—and that sentiment too would have missed the full complexity of their interaction:

- L1: Tell me about your situation. I confess . . . my husband left me for his nurse after I put him through Yale college and med school.
- C1: What an animal! Did you have kids too? I have three to raise and he is arguing about child support!
- L2: I had two to raise. And part of the time he didn't give me a dime. I had to fight him every step of the way. And won.
- C2: You go gal.
- L3: That's why I went to law school, to make sure no woman and her children go through that. We will get that husband of yours. He'll do right in the end. Trust me on that.

Here, Long, rather than having any concern about race, has thoroughly identified with her client because of the similarities of their divorces. While this kind of empathy and identification can make a client feel she has a champion, Long needs to be self-aware about the possibility of over-identifying with Jackson. Jackson may be angry at this point, but it is not at all clear that she wants (or should want) to "get that husband of hers."

The encounter between Anderson and Braxton reflects that there can be even more challenging divisions for lawyers searching for ways to connect with their clients—despite profound similarities that lawyer and client may also share:

- L1: Hello, Mr. Braxton. Come in. Ah! I see I don't have to offer you a chair since you like me have brought your own. Get comfortable here.
- C1: Mr Anderson, I hadn't realized when I called to make an appointment that you were in a wheelchair too. Call me Tony.
- L2: Tony it is and I am Al. And yes, I was the victim of a shooting in my teens. Wrong place at the wrong time. But I didn't let that stop me from finishing college and going on to law school.
- C2: I respect that a lot. I was in a car accident. I would have been a pro football player but for it. I had been picked in the draft and everything. But with a lot of prayer and help from friends and family and God, I got through and have recreated my life as a stock broker. I work for a large company . . . where I have had my troubles.
- L3: My staff told me that this was an employment discrimination case. Does your boss know nothing of the Americans with Disabilities Act?

- C3: It's not that, Al. At least I don't think so. The head of our firm is a born-again Christian. He is a member of Pat Robertson's church, and he hates gays and lesbians. He thought I was great, wheelchair and all, when I was hired because he saw me as a church-going former football player. Which of course is exactly what I am. But I am also gay and when he found that out . . . well, everything changed and my work life became hell.
- L4: Uh, well . . . Mr. Braxton. I think it only fair to tell you that I too am a member of Reverend Robertson's church. My religious views on homosexuality are separate from my job in helping you make sure that your boss follows the law.

Here Al Anderson starts out assuming that he and his client, Tony Braxton, could identify very closely as physically challenged men who, through faith, have overcome difficulties to create successful careers, only to discover that other differences—their different sexual orientations and different moral and religious views on this—may cause them to be quite distant. These differences alone may make Anderson feel that Braxton is in the “we have nothing in common” category, although clearly as a factual matter that is not true. Anderson will have to think carefully and honestly about whether his religious beliefs will allow him to zealously represent his client. And Braxton will have to decide how comfortable he is with Anderson as his attorney. On the one hand, Braxton may feel that Anderson will have some greater insight into the defense, since he will have a special understanding of his boss' position, and Braxton may feel that that will help his case. On the other hand, he must decide if he will feel comfortable with an attorney whose religious beliefs may cause the attorney to think less of him as a person, and possibly not work as diligently for him.

This aspect of the Anderson-Braxton relationship highlights the reality that while lawyers can and should work to bridge differences with their clients, they must also be prepared for the possibility that some differences are unbridgeable. Just as Braxton may be unable to trust Anderson, so Anderson may be unable to fully commit himself to representing Braxton. Again, self-awareness and honesty are key.

Here, Anderson has not revealed the details of his religiously based moral code other than to implicitly confirm that it views homosexuality in some kind of negative light. Whether Anderson should politely refuse to represent Braxton is highly contextualized—as the specifics of any attorney-client relationship are. The key issue for the lawyer is not what outside observers might conclude about the fundamental tenets of his church, but how Anderson understands whatever those tenets are. While there may be some church doctrine that re-

flects a disapproval of gay and lesbian people or homosexual behavior, there probably are also tenets on the connection between all people in the eyes of God and the primacy of love as a moving force in one's life. How Anderson understands and balances these two broad moral approaches will be decisive for his ability to represent Braxton. If Anderson's disapproval of homosexual behavior means that he, personally, dislikes anyone he discovers is gay or lesbian and feels a discomfort with and disrespect for them, then he needs to let Braxton find an attorney who can represent him with zeal. On the other hand, Anderson, who is a civil rights attorney, may find that his religious views are more focused on the aspects of brotherly love. He could decide that their shared physical challenges and the ways in which both men have relied on God and faith to succeed constitute a much greater connecting force than their differences around their sexual orientations.

C. An Illustration: Hearing the Client's Story at the "Problems and Concerns" Stage

We close this discussion of building connection in context with an illustration, from the "problems and concerns" stage of an interview. As we envision the model of basic interviewing, the "problems and concerns" stage is the first substantive stage of the interview, following greetings and initially getting to know the client and preceding learning what solutions the client may have in mind, exploring the facts in detail, offering preliminary counseling, and closing the interview. This is the stage at which you need your client to tell you exactly what her problem is, how she feels about it and what other consequences or concerns relate to it. While most clients will tell you something, most will not provide all the information that you need to help them solve their problems. You are not yet doing detailed fact exploration (that comes a little later), but you do need a sense of what happened and what it has meant for the client.

Here is where your questioning technique and your understanding of the kinds of feelings that could cause a client to feel hesitant about sharing complete information, coupled with your knowledge of how you as an attorney can contribute to your client's reticence, will all be needed to encourage any particular client to provide you with the information you need. Remember, too, that active listening is very important at this time. And you need to stay open to all information. Some clients will sum up their problems and concerns in a sentence; others may go on . . . and on . . . until you may have to intervene. In either case, and every case in between, whenever the client first stops talking *do not assume that you know what happened!* It is not yet time

to start asking closed, or worse yet leading, questions. As always, this is not an absolute rule. But too often lawyers start with leading questions far too early in the conversation. When they do so, they risk closing off fruitful avenues of discussion and, even more damagingly, leaving their client with the perception that these other areas do not matter or should in fact be hidden.

In addition, in this stage as at every juncture in the interviewing process, differences between the lawyer and client may arise that can inhibit the communication that must take place for the lawyer to ascertain her client's problems and concerns. You are, of course, always "getting to know the client" as an interview progresses, and part of what you may get to know is about difference, as in the following conversation, which takes place in the office of attorney Bryan Culbert in Seattle, Washington, sometime in late November or early December of 1999:

- L1: (After greetings and small talk) Ms. Yamashita, how can I help you?
- C1: Well, Mr. Culbert, I was arrested. It is an absolute outrage! And frankly I may want to sue the Seattle police.
- L2: I see. You have been arrested and feel that this was unjust. Do you have a lawyer for the criminal matter? And by the way, what were you arrested for?
- C2: Destruction of property, assault, resisting arrest. I was arrested near the World Bank meetings during the demonstrations downtown. And the cops just went wild! I don't have a lawyer for the arrest; that's why I came to you but I want to sue as well. I mean what happened to the First Amendment?
- L3: Okay. Well, let's start with the criminal matter first since that will move faster than any civil matter we might choose to bring and, frankly, the outcome of the criminal case may well affect our civil case.
- C3: What?! You mean I can't sue the cops for beating me because they made up these charges?
- L4: No. But if we don't "beat" the criminal charges, so to speak, while you can sue, a judge or jury may, I stress *may*, feel that whatever injuries you suffered were within the officer's line of duty because you assaulted him or her or were destroying property. So we can sue, but our case is harder. Remember there was a good deal of publicity around the demonstrations opposing the World Bank and International Monetary Fund economic policies in third world countries. Some people already believe that the Seattle cops lost it with

the protestors. And that will help us. But others think that the protestors got out of line, but even here we can focus in on you and your behavior and your right to protest peacefully and be treated with respect and dignity regardless of how others were behaving. But let's get back to the criminal situation—you were arrested demonstrating against the World Bank and the cops roughed you up. Tell me exactly what you were doing in the demonstration when the cops approached you and what they said and did.

- C4: And here is my problem again! I was not demonstrating! I'm a reporter for the local newspaper and I was trying to cover the demonstrations. And I think they—the cops—refused to believe that I was downtown after the curfew lawfully because I am black, part black. They just wouldn't listen to me. And when they finally allowed me to pull out my press identification badge and it said "Yamashita"—my name—they didn't figure I could be both black and Japanese and American too for heaven's sake! And they hit me! And at the station they put restraints on me and pepper sprayed me! I wasn't violent and I could have died!

Here, our lawyer, Culbert, is confronted with a client who is quite upset about her criminal case and the circumstances of her arrest. Culbert immediately starts using active listening (L2); he mirrors his client's statement of fact by restating the substance ("you were arrested") and he identifies the feelings she expressed ("and you feel that this was unjust"). His client, Yamashita, is so angry that she is focused on a civil case rather than the more pressing criminal matter. Culbert, in his attempt both to calm her down and to redirect her attention to the criminal case, makes some logical assumptions about what happened. If she was arrested *during* the demonstrations against the World Bank and IMF policies, it's likely that she was *participating* in the demonstrations. But in fact this didn't have to be the case. The effects of demonstrations, and police action directed at them, can involve local residents and bystanders as well as demonstrators (and this was true in Seattle in 1999).

In this case, the logical but incorrect assumption has managed to offend the client because, unbeknownst to the lawyer, the client feels that the crux of her case rests on inappropriate stereotyping and racial assumptions. You could imagine, too, that if Yamashita had not had a legitimate reason for being out past curfew—if she was neither lawfully working nor engaged in civil disobedience—the lawyer could have missed an opportunity to explore what she in fact was doing out on the streets. What if Yamashita were a drug dealer and was working, but not lawfully so? Culbert's defense might still focus in on all the

confusion of the Seattle demonstrations but if he had not asked his client about her activities in an open and nonjudgmental manner, he would not be prepared for any "surprises" about his client's history. He would generally be better off if he explored carefully whether or not his client really was on the street for the demonstrations rather than making even plausible, but premature, assumptions. Having made this mistake, however, he now must try to recover from it:

- L5: Ms. Yamashita, I am sorry. I shouldn't have assumed. You said First Amendment and I heard right to protest when you were talking about freedom of the press. Both important rights. Again I'm sorry. Let's back up. What were you doing that night exactly?
- C5: I was downtown at about 8 PM. It was after curfew but it was clear there were protestors out and I wanted to . . . well, do my job. Observe what actions they were engaged in. Maybe interview people. Some were obviously our own homegrown petty criminals out looting, but some people were mad and were able to tell me about their issues.
- L6: And that means you were doing what . . . walking or in a car? On the streets or inside stores or what?
- C6: I was walking. I had left my car so that I could really see what people were doing. I did not go into any stores because they were all closed. I just talked to people I saw on the street.
- L7: What happened right before the police approached you?
- C7: I was talking with some people who were real protestors when some other people came and broke a store window. I was trying to call to my photographer who was with me but way down the street. And then I started to shout to the people going in. Saying things like, "What are you doing? Is this part of your protest? How does breaking into a store help your cause?" And then the police came.
- L8: Did you say who you were as soon as you saw them?
- C8: Why? I'm black so I have to identify myself as legitimate?
- L9: No, but you were out past curfew and as you said, you were near people who had broken into a store. The cops could make an honest mistake given the heat of the moment.
- C9: Yeah, well . . . I didn't see them right away. I was trying to stop the looters from going in and the cops came from behind and grabbed me and threw me to the ground. And that is when I said "Hey! I'm a reporter! I'm not with them!"

L10: Did they hear you?

C10: Of course they heard me! I was screaming as one would if your arms were twisted and you had been thrown down. They didn't care!

L11: Okay, I'm sorry. I'm just trying to get a sense of what it was like out there. And these are questions—how easily able the cops were to hear you—that will come up and we have to be ready for them. What did they say to you when you said that you were a reporter?

C11: Well there were two on me. One guy, the older one, was saying "Shut up, bitch!" And the other guy was trying to cuff me. The one who said shut up, hit me too. And I screamed again that I was a reporter and the younger guy pulled out my press badge which was on a chain around my neck and started to say something like "It does say she's a reporter" and the older cop said "what!" and looked at the badge for . . . less than a second and said "Yamashita! Her! She stole that to sneak through. Take her and let's get her friends." And then they took me to the police van.

L12: Did either of these officers hit you again or say anything to you as they took you to the van?

From the conversations, we can tell that Yamashita is mixed race, African American and Asian American, and we can infer that she "looks" black. Culbert's race is unknown, but it is apparent that he is not black. That is clear from Yamashita's reaction to his question about identifying herself to the police (C8), a reaction whose heat suggests that she does not feel she is talking to someone who can identify with the problem of being presumptively perceived to be "up to no good" rather than an "upright citizen." Had Culbert been African American, he might have been able to ask the same question about identifying herself *without* getting quite the same reaction of anger and resentment. Then Yamashita might have assumed that he knows law enforcement shouldn't be that way but that he himself has had to endure such questions just to ensure his own safety when stopped by the police. Context matters. But it is important to note that non-black Culbert uses other skills in the face of his client's misunderstanding of his intent. He freely apologizes for his initial mistaken assumption about her involvement in the demonstration (L5), and apologizes again for another question that annoys her, even though he thinks he had a good reason for the question (L11). And in each case he also provides the legitimate explanation for his questions without resentment. These kinds of reactions can go a long way in encouraging a client, over time, to trust you even if your initial interactions have

been less than ideal.

At the same time, Culbert is, appropriately, asking a number of open-ended questions designed to elicit an initial account of Yamashita's problem. At L5, he asks, "what were you doing?" At L7, he continues, "What happened right before the police approached you?" At L6, he asks, "And that means you were doing what . . . ?"—though he finishes that sentence with additional, closed-ended questions (such as whether she was "walking or in a car"). He is prodding and prompting his client but avoiding out-and-out leading questions (on the lines of "You were walking, right?").

Culbert is also anticipating some questions that he will have to probe because they will be at issue later—notably in his question at L10 ("Did they hear you [say you were a reporter]?"). Although these questions are important, they are premature. The goal in "Problems and Concerns" is to be able to discern and articulate for your client what her legal and non-legal problems and concerns are. You should be able to describe your client's legal problem for her in "layperson's" terms along with any social, political, moral or religious concerns that the client has said or intimated might be involved. And, ideally, you should be able to label the legal doctrinal area in which the solution is likely to be found. You do not need yet, however, to probe the facts in detail.

One of the problems with "jumping the gun" by beginning to ask your client questions before you have clearly transitioned to Fact Exploration is that the client could misunderstand your point, as Yamashita does with Culbert. If you wait and let the client tell her story first, then she will say all that she needs to say and feel heard by you. Also, since you will have an introductory and explanatory speech for the Fact Exploration stage, you can prepare your client for questions that might sound as if you, her attorney, doubted her veracity. It is not enough, as Culbert's experience reflects, to be a sensitive and responsive person; it is also important, in building connection with a client, to shape individual questions and overall interactions in ways that foster trust. The work of building connection, in context, goes on at every stage and in every aspect of the lawyer's interaction with her client.

II. INTERVIEWING ATYPICAL CLIENTS

It may be difficult to work with clients, but a central implication of the lessons we hope to teach about building connection in context is that there are few "difficult clients." In general, the challenges clients present to you are the challenges of finding ways to work effectively and respectfully with people who, whatever their differences, are no

more imperfect than you. Conveying empathy and support, identifying your own hesitations and attractions, and planning individual questions and interviews as a whole are all important to forming relationships with your clients, but when these skills are well practiced the result, we expect, is that many seemingly difficult clients will turn out to be both less difficult and more impressive. Contexts, however, vary widely, and the skills required to engage with most clients may not be enough with some. Thinking about the “atypical clients” is both a recognition of the true complexity of lawyers’ roles, and a reminder of the importance of attention to the techniques of building connection in every case.

Here, the scene is in a law school clinic. Two third-year law students, Nate Goldstein and Mary Thompson (both in their early 20’s), are handling their first case in a criminal defense clinic. Their client, Roger Martinez, is a 35-year-old person with a mild intellectual disability.¹¹ He is charged with misdemeanor theft (theft of property that has a value of less than \$300) based on an incident in which he and a co-defendant, Michael Gregg, allegedly stole several items of fruit from a Safeway supermarket. Other than these basic facts, the students know very little about the case, which they have received on referral from the local public defender’s office. After receiving the case, Nate Goldstein called the telephone number they had for Mr. Martinez, which turned out to be that of a group home for people with intellectual disabilities. Goldstein spoke to Martinez and they agreed that the client would come in for an interview today. He asked Mr. Martinez if he would be able to get to the law clinic offices, and the client said he would get a ride from the group home house manager.

The law students wanted to meet with their clinical supervisor

¹¹ We use the term “mild intellectual disability” instead of the more conventional “mild mental retardation” because, increasingly, people with mental retardation and their allies object to the latter term, which they associate with societal stigma. While no one alternative has replaced “mental retardation,” some professional groups have adopted “person with intellectual disabilities” as the best alternative, and we adopt that convention here. See, e.g., 68 Fed. Reg. 52,401 (Sept. 3, 2003) (noting Executive Order changing name of President’s Committee on Mental Retardation to President’s Committee for People with Intellectual Disabilities, “reflect[ing] efforts to promote equality for people with intellectual disabilities”). Another term sometimes used, “person with developmental disabilities,” is both over-inclusive (there are many developmental disabilities, such as cerebral palsy or autism, that are not mental retardation), and under-inclusive (in that people with mild mental retardation may not actually be considered to have a developmental disability). See Developmentally Disabled Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15002 (8) (defining “developmental disability” as meaning, *inter alia*, a “severe, chronic disability of an individual that— . . . (iv) results in substantial functional limitations in 3 or more of the following areas of major life activity: (I) Self-care. (II) Receptive and expressive language. (III) Learning. (IV) Mobility. (V) Self-direction. (VI) Capacity for independent living. (VII) Economic self-sufficiency.”).

before the interview, as was standard practice in their program, but the supervisor was unavailable and told them to go ahead without him. Part of the supervisor's rationale was that he knew Mary Thompson had had some experience in working with people with intellectual disabilities prior to attending law school. When the students discussed who would conduct the interview, however, Goldstein said he'd like to try his hand with beginning the interview, and Thompson agreed to let him do so.

Mr. Martinez has now arrived and the interview begins:

L1(Goldstein): Good morning, Roger. This is my partner Mary Thompson. As you know, we asked you to come in today to speak with us about your criminal case. Did you have any trouble getting here?

C1: No, the house manager gave me a ride. He knew where your office was.

L2(Thompson): Great. That's terrific. We know this must be a little scary for you.

C2: Uh-huh.

L3 (G): We also want to reassure you that if there's anything you don't understand, we will try to explain it to you. Have you ever been charged with a crime before?

C3: I don't know.

L4 (G): You don't know if you've been charged with a crime?

C4: Well, I don't think I have.

L5 (G): OK, well let's just talk about this incident. Can you tell us what happened?

C5: Well, Mike and I were hanging out near the Safeway on 70th Avenue like we do a lot. Mike said that Safeway were cheaters. They stole some money from him. He was mad about it. Um . . . (Martinez trails off).

L6 (G): Roger, you're doing great. Just keep going. What happened next?

C6: Mike said he was going to get back at Safeway. He asked me if I was willing to help him. I said yeah, I would. So we went into the store and went to where the fruit is. He put some apples in his jacket. I did too. Mike then said, "Quick, let's go," so we ran out of the store.

- L7 (G): Okay. So what happened after you left the store?
- C7: I don't remember.
- L8 (G): Did you go anywhere? Did the police stop you?
- C8: We just ran real fast. We went to the group home. I went in the house and Mike went home, I guess. Man, it was cool!
- L9 (G): Did someone then arrest you?
- C9: I don't know.
- L10 (G): How did you know you were in trouble with the police?
- C10: What do you mean trouble with the police? I didn't do anything wrong. (Mr. Martinez becomes somewhat agitated.)
- L11 (G): (With a somewhat frustrated tone) Look, Roger, I didn't say you did anything wrong. But you've been charged with theft and we need to ask you these questions so we can defend you in the best way possible.
- L12 (T): (To Nate) Let me try something.
- L13 (T): Mr. Martinez, do you know what "theft" is?
- C11: Sure I do. I'm not stupid!
- L14 (T): I know you're not stupid—that's obvious to anyone who talks to you. But why don't you tell me what you think the word "theft" means, just so I can be sure you, Nate and I all understand the same thing.
- C12: I don't know how to say it exactly.
- L15 (G): So you really don't know what "theft" means.
- C13: I *told* you, I'm not stupid.
- L16 (T): Actually, Mr. Martinez, a lot of people don't know what that word means. Do you know what "stealing" means?
- C14: (Brightening) Sure! That's when you take something from someone.
- L17 (T): Has that ever happened to you, that someone took something from you when you didn't want them to?

- C15: Uh-huh. Like when Mary Kay stole my Beatles CD at the group home. She said she didn't take it but I knew she did. Larry helped me get it back from her. I really like that CD.
- L18 (T): That's exactly right. You really know your stuff. Theft is just a fancy word for stealing. So in your case, it's just like what happened with your CD, only you are like Mary Kay and Safeway is like you. And the fruit is the CD. Safeway is saying that you took the fruit without their permission. Just like you said Mary Kay took your CD without your permission.
- C16: But Mike said they were cheaters!
- L19 (T): Let's talk a little more about that . . .

Interviewing clients who are atypical in some way—such as Roger Martinez, who is a person with mild intellectual disabilities—can present particular challenges for both inexperienced and experienced attorneys alike. While there is no such thing as the normal client (a term we specifically eschew) or typical client, it is undeniably true that some kinds of clients require law students and lawyers to vary the techniques you would usually employ in consideration of your clients' special circumstances.¹² Those circumstances can reflect cognitive limitations (as with Roger Martinez), age limitations (for example, with child clients or elderly clients), or emotional or psychological limitations (such as with clients with schizophrenia). Being an effective interviewer in such cases requires consideration of approaches that must be adapted to the client's context.

In the law students' interview with Roger Martinez, there are a number of contextual elements that come into play, and the students demonstrate their appreciation of some of these and their lack of understanding of others. For example, at L1, Nate Goldstein's somewhat standard opening icebreaker of "Did you have trouble getting here?" may be an especially useful inquiry in the context of a client who might be expected to have more than the usual difficulty in following directions and getting to the law clinic office. Even though Mr. Martinez had told Nate over the telephone that he would get a ride from his house manager, making even such a seemingly easy arrangement could have created difficulties for this client. Mary Thompson's

¹² For an extensive critique of society's construction of difference with respect to disability, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990).

follow-up at L2 with an active listening response is also well-timed to put the client at ease, even if it does not apparently elicit a significant response. Goldstein's reassurance to the client, at L3, that he will explain anything the client does not understand, and his open-ended question at L5, are again standard things to say to a client but particularly important here.

But if the interview starts well in some respects, it clearly breaks down in others. Goldstein chooses to start the interview by addressing the client by his first name. Would he have done so if his 35-year-old client (who was older than both the students) had typical intelligence, or is the familiarity a subtle form of infantilizing the client? At the least, Goldstein might have asked the client's permission to address him by his first name. Note that when Thompson addresses the client (at L13), she refers to him as Mr. Martinez. Goldstein's use of Mr. Martinez's first name may also be problematic to the extent it suggests, or at the least plays into, stereotypical interactions between white people and people of color, in which the former refer to the latter by first names even when age difference would suggest a more deferential form of address.¹³

As the interview proceeds, a dynamic develops in which the client seems not to understand what Goldstein is getting at, or the terms that he is using. Mr. Martinez reacts sharply to Goldstein's imputation of his wrongdoing, at C10, and Goldstein's reaction at L11 reflects his frustration with the client's inability to help him with the factual background of the case. (It's not so clear, though, that Mr. Martinez's recitation of events, including those portions where his understanding is vague, is really very different from the knowledge of many clients charged with similar low-level crimes.) Thompson's intervention, at L13, is clearly crucial. Rather than assuming Mr. Martinez's knowledge, she asks him to explain what he knows. She then skillfully handles Mr. Martinez's anger at being called, implicitly, "stupid," by reassuring him that many people do not understand legal terms (after overcoming Goldstein's boorish interjection), and, most importantly, by substituting a term ("stealing" for "theft") that the client might be more likely to understand. Mr. Martinez's reaction reflects his sense of empowerment, if not outright joy, at being able to demonstrate his knowledge to his attorneys.¹⁴

¹³ Of course, we have not told you what race or ethnicity Nate Goldstein and Mary Thompson are. Nate's last name would probably suggest he is Jewish (at least ethnically if not religiously), though Mary's last name provides fewer clues.

¹⁴ Mary Thompson's comment at L14 that it is "obvious to anyone" that Mr. Martinez is not stupid may, of course, be stretching the truth regarding how others might perceive the client as a person with cognitive limitations. But in this context, it seems not only to be a supportive intervention designed to create (or re-establish) rapport, but also one calcu-

But Thompson goes further, at L17 and L18, by asking him to analogize his crime to his prior experiences. In this way, she is asking the client to engage in higher-order thinking than he has so far exhibited. That thinking may well lead to understanding that will make further interaction in the case much smoother. Indeed, it could inform later decisions about Mr. Martinez's capacity to understand the case and take the stand if the case is tried.

In cases like this one, it is critical that you not assume that the client lacks capacity to tell his story or make decisions merely because he is labeled as having an intellectual disability. Not only is the presumption of client capacity required by a decent respect for the client's autonomy,¹⁵ but the ethical rules require it as well. Model Rules of Professional Conduct Rule 1.14(a), on "Clients With Diminished Capacity," states:

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.¹⁶

To be sure, this formulation of the lawyer's responsibilities begs a number of questions¹⁷ (including what is meant by a normal client-lawyer relationship), but it at least requires you as a lawyer to justify deviations from what you would consider the usual or standard lawyer-client relationship that you generally adopt. Moreover, the Commentary to the Rule points out, quite correctly, that capacity is not an all-or-nothing concept but rather exists on a continuum, and that even a client with diminished capacity "often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the cli-

lated to elicit additional factual information. It also puts the law student on the side of the client by depicting her as one who does not accept the stigma that attaches to people with intellectual limitations.

¹⁵ See Stanley S. Herr, *Capacity for and Consent to Legal Representation*, in *A GUIDE TO CONSENT* 77 (Robert Dinerstein, Stanley S. Herr & Joan O'Sullivan eds., 1999).

¹⁶ MODEL RULES OF PROF'L CONDUCT Rule 1.14(a) (2000). The revised Rule 1.14, part of the Ethics 2000 Commission revisions to the Model Rules, substituted the term "diminished capacity" for "disability," "disorder," or "competence," terms which appeared in the original Rule 1.14. The Reporter explained that the change in terminology was meant to reflect more accurately the notion of capacity existing on a continuum. It is unfortunate, however, that the term "diminished capacity" has a different meaning in a criminal law context that might sow confusion when used in Rule 1.14.

¹⁷ See Paul Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515; Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609 (1989-90). For discussion (and criticism) of the role of counsel for clients with mental disabilities, see Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 37 (1992).

ent's own well-being."¹⁸

The law students' partial interview of Mr. Martinez, with its positive and negative aspects, does demonstrate some important characteristics of clients with mild cognitive impairments. First, research has shown that such individuals respond well to open-ended questions or "open, free recall questions."¹⁹ Closed questions elicit more details from these clients, but the level of inaccuracy is higher than it would be for people without cognitive limitations. Leading questions, especially when designed to be confusing (as they might well be, in cross-examination), are especially likely to lead to inaccurate recall. The reasons why people with intellectual disabilities in particular are more susceptible than others to suggestive questioning are complex,²⁰ but appear related to lower mental capacity, a heightened desire to please the interviewer/questioner, and the phenomenon of "passing"—trying to hide one's mental retardation by feigning knowledge so as to avoid admitting not knowing something one thinks one should know.²¹ Mr. Martinez's reactions in the above dialogue at C11 and C13 reflect his sensitivity about appearing not to know something he thinks he should.

That Mr. Martinez's case arises in a criminal context raises other important issues. In addition to the inevitable concern with whether the client "did anything wrong," which certainly was an issue for Mr. Martinez (C10), the client arguably finds himself in trouble criminally because of his too-ready willingness to follow the lead of his friend Michael Gregg. That suggestibility and lack of judgment, often constitutive of mild intellectual disabilities, may play a salient role in the ultimate defense or negotiation of this case.²² Moreover, though not

¹⁸ MODEL RULES, *supra* note 16, Rule 1.14 cmt. [1].

¹⁹ The discussion in this paragraph is based on several sources, including Nitza B. Perlman et al., *The Developmentally Handicapped Witness: Competency as a Function of Question Format*, 18 LAW & HUM. BEHAV. 171 (1994), and Mark R. Keibell & Chris Hatton, *People with Mental Retardation as Witnesses in Court: A Review*, 37 MENTAL RETARDATION 179 (1999).

²⁰ See, e.g., W.M.L. Finlay & E. Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation*, 40 MENTAL RETARDATION 14 (2002) (while acquiescence by people with mental retardation to yes-no questions is a function of a desire to please or submissiveness, it also may be a product of questions that are overly complex either in grammatical structure or in the type of judgments they seek).

²¹ See ROBERT B. EDGERTON, *CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED* (1967; rev. ed. 1993).

²² For a general discussion of the lawyer-client relationship with a client with mental retardation in a criminal case, see Robert D. Dinerstein & Michelle Buescher, *Capacity and the Courts*, in A GUIDE TO CONSENT, *supra* note 15, at 95. See generally Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581 (2000); James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529 (1998).

apparent in the interview excerpt presented here, defendants with cognitive limitations may present issues of competency to stand trial of which the attorney will need to be aware.

Some of the most interesting work on interviewing focuses on the difficulties of, and techniques for enhancing, eyewitness testimony. Investigators have developed the concept of the "cognitive interview" to assist people with questionable capacity (and others) in recalling events they have observed.²³ Although the earliest use of the cognitive interview was in the context of police interviews of adult eyewitnesses to crimes, experts have adapted it for use with children (including children who may have been abused) and people with cognitive limitations.²⁴ The cognitive interview focuses on the importance of concentrating the interviewee's limited mental resources on the task at hand; re-creating the context of the events sought to be recalled; encouraging the interviewee to engage in "extensive and varied retrieval" of memories; using "multiple coding and guided imagery" in remembering events in different ways; and using witness-compatible questioning.²⁵ The cognitive interview proceeds in stages that look very much like those of an interview of a conventional or typical client: "(a) the introduction; (b) open-ended narration; (c) the probing stage, during which the interviewer guides the witness [interviewee] to exhaust the contents of memory; (d) a review stage, during which the interviewer checks the accuracy of notes about the interview and provides additional opportunities to recall; and (e) the closing."²⁶ The principles of cognitive interviewing bear on all interviewing,²⁷ and careful application of this approach—or of analogous ones such as the "structured interview"²⁸—may be particularly

²³ See, e.g., RONALD FISHER & R. EDWARD GEISELMAN, *MEMORY ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW* (1992).

²⁴ See DEBRA A. POOLE & MICHAEL E. LAMB, *INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE FOR HELPING PROFESSIONALS* 83-84 (1998); Kebbell & Hatton, *supra* note 19, at 181-82.

²⁵ POOLE & LAMB, *supra* note 24, at 84-86.

²⁶ *Id.* at 87. See also FISHER & GEISELMAN, *supra* note 23, at 145-57 (on the "Sequence of the Cognitive Interview").

²⁷ See STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 73-77, 85-88 (2d ed. 2003).

²⁸ See POOLE & LAMB, *supra* note 24, at 92-94. Poole and Lamb note that the cognitive interview may not be appropriate for young children of 7 or 8 years old, who may interpret the repeated probing and multiple requests for recall as indicating that somehow they have not given the correct answer and need to change it. *Id.* at 89. They write that the structured interview, developed by researchers in Germany and the United Kingdom, "mimics the Cognitive Interview in all but a few special respects." *Id.* at 92. For example, the structured interview may dispense with context reinstatement, "report everything" instructions, image probing, and "recalling in reverse order." *Id.* (reporting on study). Despite these differences, however, "[t]he Structured Interview thus parallels the Cognitive Interview by

fruitful with clients of limited capacity.

While the interview of Roger Martinez raises issues regarding the capacity of people with mild intellectual disabilities, other kinds of clients—children, adolescents, elders, clients with mental illness or emotional disturbance—may present special considerations as well. It is critical for you to recognize the role that these clients' "differences" may play in how you conduct the client interview without assuming that there is a bright line between "atypical" and "typical" client interviewing. Nor should you assume that a "one size fits all" approach will work for all clients within the same category of difference. These categories of difference or atypicality themselves contain wide variations within, as well as between, categories.

Many of the concerns that drive the model of interviewing we present in this book—the importance of context and difference, the value of the lawyer-client relationship, the significance of client-centeredness—are just as valid for atypical clients as for others. The differences may lie more in the need for you to make some adjustments in technique, or in the recognition that many atypical clients have multiple people in their lives (family members, other professionals) who may seek to play a role in the lawyer-client relationship you set out to establish. These other people can be helpful, even essential, to the client's well-being and full participation in the lawyer-client relationship, but you must always remember that it is the person with cognitive limitations (or other aspects of atypicality) who is the client and who gets to decide (if he or she can) the role that these other people play in his or her life.

III. ENGAGING IN MORAL DIALOGUE

In examining interviewing and counseling, we hope both to provide students with overall frameworks to guide their interactions with clients and to illuminate complex questions, often wholly or partly ethical questions, that students and lawyers need to address as they move from their first lawyering experiences toward greater levels of expertise and stronger engagement with clients. Part II of this article ends with the principle of client control, and Part III begins in the same place. One of the persistently difficult questions in the area of counseling is whether lawyers should sometimes go beyond helping clients to think through problems for themselves, to add their (the lawyers') advice about what the clients should do. Perhaps the starkest of such interventions comes when lawyers offer not just advice about

emphasizing rapport, allowing witnesses to guide interactions, recommending open-ended rather than specific or leading questions, and encouraging multiple recall attempts." *Id.* at 93.

what the smart move for the client may be, but also their moral views on what it is ethically right for the client to do. In these cases, lawyers are relying on, or attempting to assert, a connection with their clients that is particularly intimate, or perhaps particularly intrusive. Whether to do so is a question, as we shall see, both of ethics and of skill; indeed, skill in this area is itself a matter of ethics. In the excerpt that follows, we look closely at a dialogue in which the lawyer offers moral (and other) advice, focusing first on when moral advice is permissible and second on how it should be given when the lawyer does decide to give it.

Richard Mathiessen is a 50-year-old divorce lawyer, with 25 years of experience in the field. For several months he has been representing Bill Arnholtz, a 35-year-old engineer whose wife has left him for another man. They have quite a bit in common (both are white, Protestant and fairly well off) and, as it happens, they have gotten along well, among other reasons because both are avid golfers and members of the same country club. It has been clear to Mathiessen for some time that the marriage is irretrievably over, and Arnholtz's wife has now filed for divorce. Her lawyer, another experienced practitioner in the midsize city in which they live, has contacted Mathiessen to begin negotiating the terms of the divorce, since both parties have told their respective lawyers (and each other) that they want to handle this process as amicably as possible. Although they have talked about what Arnholtz would like to see in a settlement, those conversations were more exploratory than concrete, and so Mathiessen has asked Arnholtz to come in so that they can talk these matters over in detail. Arnholtz arrives precisely on time, and Mathiessen comes out to the office reception area to meet him and bring him back to Mathiessen's office, where they'll have their meeting:

- L1: Bill, it's good to see you again. How have you been doing?
- C1: Oh, man, I've been terrible. I can't get to the golf course at all with this rain we've been having!
- L2: (As they enter Mathiessen's office) I know. It's a disaster. But otherwise are you okay?
- C2: Oh, I've been all right, I guess.
- L3: It's tough, huh?
- C3: It's really tough. I still can't believe she left me for that jerk, you know.
- L4: I understand.
- C4: And I'm like, lying awake at nights, re-running all the things we said to each other, and wondering how I could

have missed the clues.

- L5: Bill, I think it's going to be hard for you to get anywhere with thoughts like those, you know . . .
- C5: Yeah, yeah, I know. I really know. My therapist says the same thing. But I can't help it. And when I'm not thinking about that I'm dreaming of having a chance to show this guy what a wreck he's made of my life—or maybe just to punch him out.
- L6: Well, Bill, I really do understand your wanting to punch this guy out, but (smiling) as your lawyer I can't advise you to take that course of action.
- C6: You know I'm not that kind of guy anyway.
- L7: I do know it, and I respect the way you've been doing everything you can to deal with this in the best and most adult way possible. These things are never fun, but I've felt good about working with you because you haven't ever made it worse than it had to be. I've had some clients who I just couldn't say that about . . . Which actually brings me to the business we need to do today, which is to talk about what you want to get in the separation agreement. Have you had a chance to think about that?
- C7: Yes, I have. I had a long talk with a good friend of mine, who's been through this himself, and that really helped me sort out what I wanted to do.
- L8: So: we've talked about the two basic issues that every divorcing couple with kids have to deal with, and hopefully will deal with in a responsible way—money and custody—and you told me your initial feelings about both. Now that you've had a chance to think some more and to talk to your friend, what are your thoughts about these today?
- C8: Basically this: I don't want her to do this to me and then make a profit from it too.
- L9: I understand that feeling, Bill, but I'm not sure I know what you mean, concretely, as far as her not making a profit is concerned.
- C9: Well, you know all that law you told me about, that the courts see marriage as a partnership and basically say that each partner is entitled to an equal share of all the results of the partnership? Well, it seems to me that in a partnership if one partner is cheating on the other and the partnership breaks up, the cheater doesn't get half of what's left after the cheating. The cheater has to pay back the other partner, right?

- L10: Bill, that is right—in commercial partnerships. But our state’s law is very clear that what they call “marital fault”—the fact that one spouse or the other was a bad spouse and even was the cause of the divorce—isn’t relevant to the settlement of the money issues in a divorce.
- C10: Well, if you mean to tell me now that there’s no alternative to a straight 50-50 split, why didn’t you say so in the first place?
- L11: Bill, I know you’re upset, but that’s not like you to jump to conclusions that way. That’s not at all what I’m saying. What I am saying is that *if* this divorce goes to trial—and I know you’ve told me, very clearly, that you don’t want that, because it would only make things harder for everyone—then it would be difficult for us to avoid a 50-50 split. From what you’ve told me, you and your wife both worked full-time or almost full-time, and you both contributed significantly to the joint income of the family . . .
- C11: I contributed twice as much as she did, you know that.
- L12: Yes, I do, but her one-third would still be considered significant. Plus you both brought roughly the same assets to the marriage. And you have two kids, who have to be supported in whatever parent’s home they live in.
- C12: My friend says that if we settle out of court we can go quite a ways away from 50-50.
- L13: Yes, that’s right and I was about to talk about that. If we settle, as I know you want to—so that no one has to go through the expense and pain of a trial—then probably the judge will approve the agreement we make, even if it’s not 50-50. The courts assume that, at least within a certain range, the divorcing couple knows best.
- C13: So that’s what I want to do. I want to settle, and I want the settlement to give my wife—I’m sorry, but this is how I feel—as little money as possible.
- L14: Bill, you’re entitled to feel that way, and you don’t need to apologize to me for it. My job is to help you accomplish what you feel you want, as far as it can be accomplished.
- C14: So how far can this be accomplished?
- L15: Well, that depends first of all on who’s going to have custody of the kids. Whoever has custody has to have enough money to support the kids, and the courts are pretty vigilant about that. The last time we spoke I thought you felt pretty clear that the kids would need to be primarily with their mother. Did I get that right?

- C15: Yes. It has to be her, really. You know I travel 3 or 4 days a week for my job, and I have no one else to take care of them.
- L16: So we have to include in our offer enough money for her to take care of the kids.
- C16: Not from what my friend tells me.
- L17: I'm not sure I see where you're going. What exactly did your friend tell you?
- C17: He said that the way to make her back off on the money is to threaten to fight about custody.
- L18: You mean, to tell her that we're going to press for custody even though you don't actually want custody?
- C18: Yes, exactly.
- L19: (Pause)
- C19: Are you going to tell me there's something wrong with that? I don't see how there can be. If I'd broken my leg, and suffered \$50,000 of damages, it wouldn't be wrong for me to start negotiating from \$250,000, would it? I mean, doesn't that happen every day?
- L20: Yes, that happens a lot, of course.
- C20: And it's not as if I'd have no chance of getting custody if I did make a fight of it. I mean, she's had her problems as a mother, like I've told you, and if I had to I could always hire a nanny or an au pair or something to take care of them when I'm away.
- L21: Tell me again what her problems as a mother were, would you?
- C21: She had a nervous breakdown when our little one was a year old, and from then on she was in twice-a-week therapy. And for a while she had a drinking problem. I'm not saying she was a bad mom, not at all—and I'm not saying I was all that great a dad—but I could make a fight of it, don't you think?
- L22: (Quietly) You could make a fight of it.
- C22: And if I did, that would be pretty likely to make her want to come down on all the money issues, wouldn't it?
- L23: Some people can be scared easier than others; I don't know how easily your wife would scare.
- C23: Well, let's be frank. I know it would kill her to lose custody of the kids. I think she'll scare.
- L24: Bill, there are a lot of things I could say to you about this.

I'm not so sure she'll scare—remember, she has a lawyer too, and I do know that lawyer, and *she* doesn't scare very easily. And I know what threats lead to, and so do you—they lead to fury as much as fear. Hell hath no fury, Bill, hell hath no fury like this. She'll try to scare you back, and you'll maybe think of some other way to scare her even worse, and before you know it the two of you might even be in trial after all—maybe you won't get this divorce done for years.

C24: No, no, no, that wouldn't happen. I would never let it go so far.

L25: I wish I could share your confidence, but I've seen these things go from bad to worse more times than I like to think about. I know one couple who spent *eleven years* litigating their divorce. It became their drug, Bill, their addiction. By the time it was all over, there was nothing left to divide up—and the husband had a terminal illness. But maybe you will still settle it. Do you think the anger will go away? How long will your wife have to think about how you scared her into taking a bad money settlement, after this is over? Your kids are how old, 5 and 7?

C25: Yeah.

L26: So she'll have, oh, 15 years to think about this every day while she's trying to manage her life, and take care of the kids, on whatever you've agreed to let her have. She won't suffer in silence, Bill. What effect do you think that will have on how you and she deal with each other, and on your kids?

C26: All right, I hadn't thought about that. Maybe I need to give this some more thought.

L27: I really hope you will.

C27: But you're really coming on strong here, and I guess I want to make sure of one thing: if I come back and say, yes, this really is what I want to do, I know the risks and all and I've decided I can handle it, you will do it for me, won't you?

L28: Why don't we not cross that bridge till we come to it, Bill? There are some complicated issues of legal ethics here, frankly, and if we have to deal with them I'll explain them to you, but frankly, Bill, I don't think you're going to come back here and tell me that this is what you want to do. I have too much respect for the way you've handled yourself up till now to think that you're going to let the upset you're feeling affect your judgment this way.

- C28: I don't get it. How can you say you respect me and at the same time not promise to help me do what I decide I want to do, as long as it's legal? I mean, if this is illegal I don't want any part of it, but it isn't, is it?
- L29: No, Bill, I don't think it is. But it is something that a lot of lawyers just won't do, and I'll tell you why, so you don't think I'm speaking this way because I'm against you or anything like that. I have a lot of respect for you, Bill, and I think this conversation is just a bump in the road and that we'll look back on it someday and smile. The lawyers I'm thinking of—and I consider myself one of them, Bill, and I've been proud to work on your case because I think you're this sort of person yourself—we feel that even though in most negotiations and on most issues it's fair to play a very hard game of hardball, that isn't true when kids are at stake. Even if it would save you money, and you know I'm not at all sure it would, even then it would just be wrong. The parent who has custody of your kids needs a fair money settlement to take care of them, and even more important the kids need parents who aren't at each other's throats. If you go down this road, you risk harming your kids, and that's a risk I probably wouldn't be prepared to take on your behalf. I'm not deciding this for myself right now, because you might come back and show me some aspect of all this that I haven't thought about yet or understood properly, but right now, Bill, right now, my answer would be that I'd have to resign from your case if you insist on going this route.
- C29: Wow. I didn't think lawyers said things like that to their clients.
- L30: Well, they don't, usually. But sometimes they do, when what's at stake is something like children.
- C30: I guess I've got a lot of thinking to do. But you know that when I'm done thinking, I may be looking for another lawyer.
- L31: Yes, Bill, I understand that. I think we've worked well together up till now, and I'd like to continue with you, but if you want to get another lawyer, you certainly have that right, and I wouldn't stand in your way.

A. *The Morality of Moral Dialogue*

Dialogues like this one may be quite unusual in actual legal practice. In many situations, lawyers who contemplate beginning such dia-

logues will hesitate because of their own fear of losing clients, including clients who can tarnish the lawyers' reputation or otherwise injure their business. Ideally, lawyers will rise above their own interests in such situations when they must—but "when they must" is far from "always," and we do not question that lawyers should consider their own well-being as well as the well-being of the people their clients seek to injure when they decide whether or not to begin such dialogues. We suspect that many lawyers faced with such dangers find ways to accomplish what they see as morally required through the process of counseling about legal obligations and practical consequences—and we do not quarrel with approaching moral concerns obliquely, by focusing on such practical considerations, when it is feasible and so long as the discussion of practical considerations is itself accurate.

We also fully recognize that in many cases where lawyer and client may not be of one mind, the lawyer will not feel that the moral stakes justify the kind of intervention reflected in this Part's dialogue. In many cases it may be perfectly legitimate for such lawyers to follow their clients' implicit lead and say nothing at all about morality. In other cases, lawyers might reject complete silence but see their role, quite appropriately, as limited to assisting their clients to clarify their own thinking (by asking, for example, whether the clients have considered any moral issues that their plans might suggest). Lawyers might also offer moral comments that stick to suggesting to the client conclusions that might follow from the clients' own moral beliefs as the clients have already articulated them—rather than adding the lawyers' moral views as well. All of these approaches, along with the effort to achieve moral results through appeals to client self-interest, have their place.

We focus, however, on the possibility that sometimes more is appropriate as well. This section of our book will examine the justifications and the methods of conducting such moral dialogues—counseling conversations in which you invoke morality, rather than solely law or the client's pragmatic self-interest, in an effort to persuade a client to make a particular decision.

There are strong arguments both for and against such dialogues. The most powerful argument in their favor is the most obvious: otherwise wrong will be done. The most powerful reason not to enter such dialogues is equally clear: you may violate the client's right to choose for himself. But neither of these arguments is as self-evidently valid as it might at first appear. To say that "wrong will be done" is to assume that your view of what is right and wrong is correct, and it may not be. Lawyers have no monopoly on wisdom, and no immunity from bias,

self-interest and limited perspective. Here, it is easy to share Mathiesen's disapproval of the custody threat tactic, which seems brutal and discriminatory. Yet it has to be recognized that divorce negotiations are inevitably focused on custody and money, and it is hard to imagine negotiations that do not involve pressure on each of these fronts, potentially from either spouse.²⁹

Similarly, to say that the client's right to choose will be violated assumes that clients do not want to think about morality, or at least do not want to hear their lawyer's views while they do so. But why should we assume that clients are indifferent to morality? On the contrary, it is a form of respect for another person to assume that he or she is a moral person who will want to take these considerations into account.³⁰ Your intervention may be initially unwelcome, but at least if you handle the discussion sensitively many clients faced with difficult moral choices may come to appreciate your words. Moreover, your decision not to discuss morality, if that is the choice you make, may also affect the client, by encouraging him to believe that he can act without regard to moral constraints.³¹

The moral calculus suggested by these cross-cutting arguments is not easy to resolve. The rules of professional ethics reflect this difficulty, and do not eliminate it. The Model Code tells us that "[a] lawyer should bring to bear the fullness of his [or her] experience" in counseling the client, but does so only in an Ethical Consideration rather than a Disciplinary Rule.³² The Model Rules make clear that moral considerations are appropriate subjects for counseling, but stop short of requiring lawyers to address these considerations.³³ The Restatement of the Law Governing Lawyers is similar.³⁴ The Model Rules and the Restatement also authorize lawyers to withdraw from cases out of

²⁹ See *In re Marriage of Lawrence*, 642 P.2d 1043, 1049 (Mont. 1982) (for the court to "conclude that a separation is violative of public policy if one of the parties threatened a custody fight in order to gain in the property distribution . . . would not be based on any kind of a realistic understanding of preagreement negotiations"). Scott Altman has reported that both husbands and wives employ "pressure to trade custodial time for financial terms," though husbands, it seems, resort to it more often. Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 501-04 (1995).

³⁰ Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1088 (1976).

³¹ See Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 188-92 (1999).

³² MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1983).

³³ MODEL RULES, *supra* note 16, Rule 2.1 (2003). It is possible to read the comment to this Rule as declaring a duty to give moral advice in certain circumstances, but the language of the Rule itself is permissive rather than mandatory.

³⁴ RESTATEMENT OF THE LAW GOVERNING LAWYERS § 94(3) (1998). Under the Restatement such advice is required, if competent and diligent lawyers in similar circumstances would provide it. See *id.* cmt. h, citing *id.* § 52 ("The Standard of Care").

moral disagreement with their clients, and the Model Code authorizes this as well, though perhaps not as widely—but none of these rules compels lawyers to withdraw for these reasons as long as the lawyers are still able to vigorously represent their clients.³⁵

The rules' hesitancy is not improper. What the rules do is, we think, what must be done—namely to leave the extent of moral counseling that lawyers undertake to be decided, usually, by each lawyer, and in each case. Moral dialogues are permitted, rather than mandated or forbidden, and so it is up to each lawyer to resolve the moral calculus. We ourselves have somewhat different responses to this problem, but we offer the following general guidelines that we hope will assist you in addressing it for yourselves. In our book, we will discuss these in more detail; here, we set them out only briefly.

The moral stakes: The case for a moral dialogue will be stronger the greater the moral issue at stake.³⁶

The debatability of the issue: The clearer your conviction about what is morally required in the situation, the more willing you should be to intervene. We recognize the paradox implied by this guideline: A true dialogue is one in which both parties are open to change, but in the relatively infrequent cases where a lawyer following our guidelines would feel called upon to intervene morally, a lawyer convinced the issues are not debatable may be far from open to change. We must accept the probability of non-dialogic dialogues, and reckon it as one of the flaws of such interactions.

The client's capacity: The more able the client is to make an independent judgment, the more appropriate it is for you to urge your moral views.

The presence of shared values: Lawyers and clients rarely have relationships so intense or so longstanding that the lawyer can "convert" the client. We mean "convert" partly in its religious sense—the law office is no place for a lawyer to press her religious views on a client, however much those views seem to the lawyer to embody moral truth.³⁷ We also mean

³⁵ MODEL RULES, *supra* note 16, Rule 1.16(b)(4); RESTATEMENT, *supra* note 34, § 32(3)(f); MODEL CODE, *supra* note 32, DR 2-110(C)(1)(e).

³⁶ It is worth noting that if the conduct the client has in mind is not simply immoral but also criminal, the boundaries of legitimate counseling by the lawyer may be considerably broader than those described here. This discussion focuses on clients' choices among options that are legal, choices that competent clients are entitled to make. Competent clients are not entitled to choose to commit major crimes, and lawyers are not bound by the same duty to respect client competency in dissuading them.

³⁷ There may be times, however, when lawyers and clients who already share a religious

the word “convert” more metaphorically: the lawyer is not likely to be able to alter the client’s world view in some fundamental way, and it will rarely be fruitful or wise for her to try. It seems safe to say that lawyers and clients will make most progress together if they share a range of values and jointly explore their meaning. To say this is not to require lawyer and client to come from backgrounds as similar as Mathiessen’s and Arnholtz’s, but it is important to keep in mind, here as elsewhere, the potential impact of commonality and difference between the lawyer and client. Lawyers and clients who seem to each other to share less will have to travel a greater distance toward common ground before a lawyer’s moral intervention will be likely to be effective, or welcome.

Compatibility with the legal purposes of the relationship: Moral truth can be found in many places, but it is not the central concern of either lawyers or clients. There is more room for morality in some lawyer-client encounters than in others—more room in framing a will, perhaps, than in defending against a serious criminal charge, more room in longstanding relationships than in new, one-time-only ones—but still, in general, not the same room as in the confessional. The scope of moral urging between lawyer and client needs to be constrained by the secular, pragmatic functions that seem to be the principal reason clients turn to lawyers in the first place.³⁸

Lawyer self-interest: The goal of moral dialogue is to help clients to do the right thing. That goal may be compromised if the “right thing” as the lawyer sees it also happens to be what serves the lawyer’s own selfish interests best. To guard against this, you need to examine whether your own concerns and needs may be shaping your views of the client’s moral dilemma. We do not argue that the mere possibility of conflict of interest should silence lawyers’ moral counseling—there are no perfect people available to counsel others,

background pray together in the lawyer’s office; we ourselves would not seek shared understanding or encouragement this way, but lawyers who follow different religious paths might. For sharply contrasting views on the proper role of religion in the law office, compare Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979), with Robert J. Condlin, “What’s Love Got to Do With It?” - “It’s Not Like They’re Your Friends for Christ’s Sake”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. — (2003) (forthcoming).

³⁸ John Leubsdorf and Stephen Pepper helped us understand these points.

whether on moral grounds or merely practical ones. We do recognize, however, that the greater the lawyer's self-interest, the more the lawyer should hesitate to press views that may ultimately be rooted in that rather than in disinterested moral judgment.

These six factors, as we have already said, do not add up in mathematical fashion. We believe, however, that these considerations rightly shape the decisions that lawyers must make about whether to engage in moral dialogue or not. They also rightly shape decisions about the intensity or intrusiveness of the dialogue you should undertake, if such a conversation is undertaken at all. But even when the moral stakes are at their highest, it would be difficult to justify undertaking moral dialogue if it were impossible to conduct a dialogue that actually engaged with the client without coercing him. We turn now, therefore, to a discussion of the elements of an appropriate moral dialogue.

B. The Methods of Moral Dialogue

How to conduct a moral dialogue is a subpart of the broader question of how to conduct any counseling dialogue, and how to persuade about moral propositions is a subpart of the broader question of how to persuade a client of any proposition at all. But the study of moral dialogue can illuminate the broader study of counseling and persuasion in general, and we see the Mathiessen-Arnholtz dialogue as illustrating a number of important points about technique. Here we emphasize two fundamental, and somewhat contrasting, lessons this dialogue suggests.³⁹

1. A moral dialogue is an effort at persuasion

Persuasion is a field in itself. Law students and lawyers study it in connection with closing arguments and other trial tactics; in the context of negotiations and mediations; and in brief writing and oral argument. There is undoubtedly much to be learned from the general study of persuasion for the specific field of moral dialogue. To be sure, many tactics we accept as legitimate in other contexts would be out of bounds in the context of moral dialogue. A lawyer arguing a case to a judge on behalf of a client may offer arguments he himself does not believe should be accepted, or appeal to jurors' emotions in a way that

³⁹ Thomas L. Shaffer and Robert F. Cochran, Jr., have also explored the elements of moral dialogue. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 94-134 (1994). Stephen Pepper has also described some contours of these encounters, in Pepper, *supra* note 31, at 202-04.

he himself hopes will distract the jurors from focusing on the evidence in the case at hand. A negotiator may demand concessions simply on the basis of power. Insincere arguments are out of bounds in moral dialogue, and so are arguments or ploys meant to undercut instead of to enhance the client's ability to think a matter through. But many of the techniques that lawyers, or politicians, sometimes employ for merely strategic purposes nonetheless are potentially appropriate and helpful in the conduct of genuine moral dialogues.

Perhaps the most important point to remember is that persuasion is rarely dispassionate. These dialogues are not academic. Instead, they address practical and pressing issues, which both lawyer and client probably feel strongly about. It is not wrong for you, as the lawyer, to "come on strong." At the same time, it is wrong for you to be so overbearing that the decision the client makes is no longer meaningfully his own.

Here, when Mathiessen faces the moral issue squarely with his client, he does so in a generally appropriate—though certainly passionate—way. His style of speech is clear, emphatic and blunt. He leaves his client no room for doubt about his (the lawyer's) position, or about how strongly he feels about this position, and he implies in a range of ways that what he is saying is self-evident. Thus he uses repetition ("Hell hath no fury, Bill, hell hath no fury like this" (L24)), and rhetorical questions, sometimes more than one at a time. ("Do you think the anger will go away? How long will your wife have to think about how you scared her into taking a bad money settlement, after this is over?" (L25)). He uses familiar phrases, which are not only attention-getting but also each invoke a host of folk wisdom (or folk assumptions)⁴⁰ about human behavior that the lawyer implicitly suggests his client would be foolish to ignore: "Hell hath no fury, Bill," (L24); and, a little later, "She won't suffer in silence, Bill." (L26) He is by turns rueful ("Hell hath no fury . . ."), sarcastic ("She won't suffer in silence . . ."), and impatient ("I know what threats lead to, and so do you . . ." (L24)). He employs alliterative, memorable language: threats, he says, "lead to fury as much as fear." (L24) He uses the metaphor of drug addiction to drive his point home even further. (L25) For a short stretch, probably two or three minutes, he even does almost all the talking, with his client offering one brief objection (C24) but otherwise carried along by the tide. (L24-L26)

He also tells, or at least sketches, a story. Here, as elsewhere,

⁴⁰ On the importance of our "stock" of stories, characters and theories to our actual understanding of much of what we experience in the world, see, e.g., Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 5-9 (1984).

narrative can play an important role in effective communication.⁴¹ The narrative Mathiessen traces is a vision of vengeance and feuding and the growing, implacable rage Arnholtz's wife will feel, a prospect that brings home the likely effects of Arnholtz' choice much more dramatically than, say, a reference to the statistics in the latest studies of divorce. Within that story he tells a more specific one, again trying to ensure that Arnholtz cannot ignore what he is saying: "I know one couple who spent *eleven years* litigating their divorce. By the time it was all over, there was nothing left to divide up—and the husband had a terminal illness." (L25) This story's reference to mortality is probably part of what makes it effective; if Mathiessen had said that the fight caused the husband's illness, he would have been preposterous and laughable, but his outline of the bare facts of the situation lets Arnholtz speculate about this himself. Perhaps more important, this offhand reference to death helps remind Arnholtz that he has only one life to get right, an important consideration since this decision will, Mathiessen is urging, shape the next "oh, 15 years," during which his wife will be thinking every day about what Arnholtz did to her in this settlement.

In short, a bluntly phrased, emotionally loaded, near-monologue for several minutes is not excessive persuasion. Certainly this is a judgment call, and reasonable lawyers might see Mathiessen as having gone too far even in these few minutes. Certainly the dialogue would have a different tinge if he had maintained this level of intensity for much longer. (As a practical matter, effective persuasion might well have required a longer conversation than our dialogue presents. In a longer conversation, however, we would have expected the emotional temperature to rise and fall, and the role of the client, overall, to be greater than it was in these few minutes here.)

In a range of other ways Mathiessen could have crossed the line into undue influence. The dialogue would certainly have been different if Mathiessen had stepped out of the room and sent in an ally—Arnholtz's brother, for example—to join in the persuasive chorus. It would also have been a different and more troubling exchange if Mathiessen had gone beyond intensity to tears and shouts, or cries and whispers; this exchange is passionate but reasonably calm and that calm is an important part of what lawyers are supposed to bring to clients. For similar reasons this would have been a different conversation if Mathiessen had gone beyond vivid language ("It became their drug, Bill, their addiction." (L25)) to epithets or insults ("You'll be no better than a child-abuser, Bill."). We would also be much more dis-

⁴¹ On the importance of storytelling, even implicit storytelling, to persuasion, see, e.g., Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9 (1994).

turbed if Mathiessen had made greater use of his emotional power vis-à-vis his client, for example by saying things like “I expected better of you” or “As a lawyer I feel your conduct is unacceptable”—though he does seem to make some use of this sort of pressure early in the conversation and late, concluding with his comment (L29) that “I’ve been proud to work on your case because I think you’re this sort of person” So, too, it would have been a much less appropriate conversation if Mathiessen had insisted that his client sign on the dotted line then and there. Mathiessen did put pressure on his client, and obviously meant to do exactly that. There was much more that he could have done, and did not do, however, and he appears to have avoided losing control on this admittedly slippery slope.⁴²

2. *Inquiry and empathy are crucial components of moral dialogue*

We have not faulted Mathiessen for speaking vigorously. We do fault him for not listening better at the same time. Listening is important in every contact with your client, and moral dialogue is no exception. It is important for you to understand what the client actually wants to do, and to determine whether the client does have a moral basis for doing it. Moreover, here as elsewhere, your goal should not generally be to take the client through a series of highly focused and directive questions that allow you to dissect the client’s thinking; rather, especially at the start, the client needs to be invited to speak and you need to make clear that you are listening. This is all the more important where, as is the case in a moral dialogue, you ultimately may not be prepared to offer the client *nonjudgmental* empathetic regard; since you may well become judgmental, you need to do everything you can to still be otherwise empathetic and attentive.

Mathiessen wins the battle but loses the war as a listener. He learns—though not very quickly—that Arnholtz wants to threaten a custody battle, even though Arnholtz doesn’t actually want custody and really believes that his wife “has to” be the custodial parent. (L15-C18). He also confirms that Arnholtz has a colorable legal claim for custody, which may be what leads him to acknowledge that the strategy is a legal one.⁴³ (If it were not legal, then Mathiessen could oppose it on quite different, and more adamant, grounds.) After hearing

⁴² Yet Mathiessen does make clear to Arnholtz that in the end he may withdraw from the case rather than go along with Arnholtz’s wishes. Candor may well have compelled this revelation, but for Arnholtz this information might have operated as a threat. Lawyers of course are not normally permitted to threaten their clients—but because the rules of ethics do permit withdrawals for moral reasons, in some circumstances we believe lawyers can legitimately employ this threat. The Restatement endorses such “consultation with a client before withdrawal.” RESTATEMENT, *supra* note 34, § 32 cmt. n.

⁴³ On the status of custody threats in legal ethics, see Altman, *supra* note 29, at 525-26.

Arnholtz's arguments for his own position (his partnership metaphor (C9), his assessment of who contributed more to the marriage financially (C11), his analogy to other hardball negotiating tactics (C19), and his belief that his wife will scare (C23)), moreover, Mathiessen can tell that his client has embraced this idea and a set of supporting arguments or rationalizations—many of which perhaps come from Arnholtz's friend. And, finally, Mathiessen can see, from Arnholtz's angry remarks (C10, C11, C19) and of course from his explicit questions and comments about whether Mathiessen will stick with the case even if Arnholtz sticks with his custody threat strategy (C27-C30), that Arnholtz has lost trust in him and found a more welcome adviser in the "friend" who suggested this tactic to him.

But part of the hostility Mathiessen encounters may have been triggered by his own failure to convey an empathetic understanding of his client's wishes. Instead, Mathiessen reacts in at least three distinctly unempathetic ways. First, he tries to convey an expectation that Arnholtz will stay on the "adult" path in this divorce. Some of his comments to this effect seem entirely benign, such as his gentle suggestion that Arnholtz should try not to lie awake re-running the breakdown of his marriage in his mind (L5). But Arnholtz hears these along with others whose purpose is more overtly directive, notably Mathiessen's comment that "I've felt good about working with you because you haven't ever made it [the divorce] worse than it had to be. I've had some clients who I just couldn't say that about . . ." (L7), or his later reminder to Arnholtz that "you've told me, very clearly, that you don't want [a trial], because it would only make things harder for everyone" (L11). Mathiessen seems to be trying to hold onto ground he has already won with his client, rather than focusing on his client's current feelings. That Arnholtz gets this message is most evident at the end of the interview, when Mathiessen returns to this tack, saying that he has "too much respect for the way you've handled yourself up till now to think that you're going to let the upset you're feeling affect your judgment this way." (L28) Arnholtz responds by asking "[h]ow can you say you respect me . . . ?" (C28)

Second, Mathiessen responds to the early hints that Arnholtz has a harsh strategy in mind in a notably analytic rather than embracing way. When Arnholtz says, dramatically but hardly cryptically, that "I don't want her to do this to me and then make a profit from it too," Mathiessen responds, "I understand that feeling, Bill, but I'm not sure I know what you mean, concretely, as far as her not making a profit is concerned." (C8-L9). The perfunctory claim of understanding here gives way at once to an effort to translate that feeling into dollars and cents. A more genuinely understanding response to the content of

Arnholtz's remark, and one that would not have required exceptional insight on Mathiessen's part, would have been to say, "So you're feeling like the financial settlement here should make your wife pay for what she did to you?" Rather than help Arnholtz articulate his wishes, Mathiessen seems to be forcing him to do the work. The pattern continues in their next exchange, when Arnholtz makes a legal argument based on his understanding of partnership law and Mathiessen responds with more "law talk" of his own, launching them on a discussion of whether what Arnholtz wants is legally achievable (C9-B10).

Arnholtz finally brings them back to the issue—his desires, not the law—at C13, when he declares, with an apology, that he "want[s] the settlement to give my wife—I'm sorry, but this is how I feel—as little money as possible." Although Mathiessen responds to Arnholtz's apologetic declaration in C13 by saying "Bill, you're entitled to feel that way, and you don't need to apologize to me for it" (L14), in fact he then tries to steer Arnholtz away from the custody threat strategy by saying, quite incorrectly, that their settlement offer would "*have to include . . . enough money*" for Arnholtz's wife to take care of the kids (L16, emphasis added). When Arnholtz nevertheless begins to suggest the custody threat strategy, Mathiessen again makes him do the work of articulating it (L17: "I'm not sure I see where you're going. What exactly did your friend tell you?").

Third, Mathiessen reacts so negatively to Arnholtz's proposal, once it is finally on the table, as to suggest that he not only disagrees with his client's plan but is appalled by it. He spells the idea out in a way that makes it seem dishonest: "You mean, to tell her that we're going to press for custody even though you don't actually want custody?" (L18) When Arnholtz answers "Yes, exactly," Mathiessen's response is a pause so pregnant that Arnholtz rightly sees condemnation looming. (L19-C20) A moment later, Mathiessen concedes the strategy's viability, again with evident dismay (L22).

Mathiessen's responses may in part reflect his own passion on this subject—and we do not believe passion is out of place in moral dialogue. But his responses also appear to embody a strategy, a strategy of sustained pressure meant to dissuade his client even before the lawyer actually offers a direct argument about the morality of the client's choice. The strategy fails here, and may in fact have worsened the ultimate confrontation between the two men. It would have been better, we think, had Mathiessen been more empathetic about his client's anger and need for revenge, and more willing to help his client articulate his desires in the form of a legal strategy. He might have responded to Arnholtz's intense reference to "what my friend tells me" (C16) by saying, for example,

L17*: Bill, I'm not sure I'm going to agree with where you're going, but I think I understand the idea. You're hoping to find a way to force your wife to take a small financial settlement, right?

He might have continued by saying,

L18*: I won't beat around the bush. The most common idea that people think about when they feel the way you do is threatening a custody fight. Is that what you have in mind?

There is a price to this approach, namely that it may reveal to the client an immoral tactic he hadn't yet thought of. But it hardly seems, at this point, that Arnholtz is unaware of this gambit. Had Mathiessen been more forthcoming and thus sustained his emotional alliance with the client further into the conversation, he might have been able to make a strong moral argument without putting the continuation of the lawyer-client relationship so completely at risk. As it is, his vigorous attempts at persuasion may have fallen on deaf ears.

CONCLUSION

We begin and end with listening. Effective inquiry and sensitive expression of empathy are skills, essential to the forging of connection with clients, as we saw in both Parts I and II. They are also ethical obligations, however, as Part III reminds us. They are integral to shaping relationships through which you can effectively assist your clients—and effective service is itself an ethical responsibility of lawyers. They are no less integral to developing relationships that honor clients as people entitled to respect—even respect expressed in the form of challenging moral intervention—and that respect, we believe, is equally an ethical responsibility of our profession. That said, we also return to another beginning point, a recognition that no formula can prescribe how a lawyer should thoughtfully handle an individual case. We hope that readers of this book (and of these excerpts) will find the lessons of these dialogues helpful as you formulate and apply your own theories of representation in your cases.